87-1490

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN E. MALLARD, Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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March 4, 1988

38

QUESTION PRESENTED

Is a federal court empowered by 28 U.S.C. Section 1915(d) to require an unwilling attorney to represent a person making a request for counsel thereunder?

LIST OF PARTIES

The parties to the proceedings below were the petitioner John E. Mallard and the respondents United States District Court for the Southern District of Iowa, Mark Allen Traman, Michael D. Woods, Jr., Charles O. Reese, Steve Parkin, Robert W. Umthun, Robert Staub, Myron Mason, Mike Booten, Charles Harper, Ronald G. Welder, and Harry Grabowski

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The petitioner John E. Mallard respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on December 7, 1987.

OPINIONS BELOW

The Court of Appeals for the Eighth Circuit did not write an opinion, and its order is retyped in the appendix hereto,

p. 1a, infra.

The ruling of the United States District Court for the Southern District of Iowa (Vietor, C.J.) has not been reported. It is reprinted in the appendix hereto, p. 2a, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. Section 1983, plaintiffs brought suit in the case of Mark Allen Traman et al. v Steve Parkin et al., Civil No. 87-317-B, in the United States District Court for the Southern District of Iowa. Plaintiffs asked to have a lawyer appointed and, pursuant to 28 U.S.C. Section 1915(d), the petitioner was appointed to represent plaintiffs. On October 27, 1987, the District Court denied the petitioner's motion to dismiss his appointment. On December 7, 1987, the Eighth Circuit denied the

petitioner's application for a writ of mandamus directing the District Court to grant the petitioner's motion to dismiss his appointment.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

28 U.S.C. Section 1915. Proceedings in forma pauperis

(d) The Court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

STATEMENT OF THE CASE

Petitioner was appointed pursuant to 28 U.S.C. Section 1915 to represent two indigent inmates of the Iowa State Penitentiary at Fort Madison, Iowa, and

one indigent former inmate, who had, collectively, brought an action under 42 U.S.C. Section 1983. The inmates complained that various prison guards and officials had filed false disciplinary reports against them, mistreated them physically, and endangered their lives by exposing their role as informants.

Petitioner filed a motion seeking the dismissal of his appointment on the grounds (a) that he was not competent to represent the inmates based on his general lack of experience in litigation and (b) that 28 U.S.C. Section 1915(d) does not empower the District Court to require an unwilling attorney to represent a person making a request for counsel thereunder. The District Court denied the petitioner's motion to dismiss, holding (p. 2a, infra) that "28 U.S.C. Section 1915(d) empowers the court

to appoint attorneys to represent indigent civil litigants."

It is significant to note that in the context in which the District Court ruled, the usage of the term "to appoint" was synonymous with the term "to require" rather than the term "to request," which appears in the text of Section 1915(d). There are many cases which hold that Section 1915(d) empowers the court "to appoint." However, most of these cases construe the term "to appoint" to be consistent with the term "to request," meaning that a court has power "to appoint" under Section 1915(d) after an attorney has been requested to undertake a representation and has consented to act as counsel.

In light of the substantial authority which construes Section 1915(d) to mean that a court may only "request"

an attorney to represent an indigent person (pp. 9-10, infra), the petitioner sought appellate review of the District Court's ruling through an application for a writ of mandamus directing the District Court to grant the petitioner's motion to dismiss his appointment. The Eighth Circuit denied the petitioner's application for a writ of mandamus, thereby effectively holding that the federal court can compel an unwilling attorney to represent a person making a request for counsel under Section 1915(d).

The Eighth Circuit did not write an opinion in support of its judgment (p. 1a, infra) but it appears that the Court relied upon its holding in Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971), which stated:

> The district court ruled that it had no power to appoint counsel to represent an indigent in civil cases. This ruling overlooks the

> express authority given it in 28 U.S.C. Section 1915 to appoint counsel in civil cases. This court and other courts of appeals regularly make these appointments in habeas corpus and civil rights cases; district courts throughout the country do the same.

Id. at 757 (footnote omitted; emphasis in original). See Nelson v. Redfield Lithograph Printing, 728 F.2d 1003, 1005 (8th Cir. 1984) (appointing counsel for Title VII case under 28 U.S.C. Section 1915(d)). See also Tyler v. Lark, 472 F.2d 1077, 1078-80 (8th Cir.), cert. denied sub nom. Beilenson v. Treasurer of U.S., 414 U.S. 864 (1973) (counsel appointed to prosecute 42 U.S.C. Section 1983 action may be compelled to serve without compensation).

It appears that the Eighth Circuit supports its holding that the power "to request" as stated in Section 1915(d) confers a power "to make a mandatory appointment" based upon a finding of some

traditional, professional duty of attorneys to volunteer their services:

> Lawyers have long served in state and federal practice as appointed counsel for indigents in both criminal and civil cases. The vast majority of the bar have viewed such appointments to be integrally within their professional duty to provide public service. Only rarely are lawyers asked to serve in civil matters. We have the utmost confidence that lawyers will always be found who will fully cooperate in rendering the indigent equal justice at the bar.

Peterson v. Nadler, 452 F.2d 754, 758 (8th Cir. 1971).

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit's determination that 28 U.S.C. Section 1915(d) empowers a federal court to require an unwilling attorney to serve as counsel (a) extends the federal court's authority beyond the statutory limit to "request" an attorney, and (b) conflicts with decisions of other Circuits.

28 U.S.C. Section 1915(d) provides, in relevant part, that "[t]he court may request an attorney to represent any such

person unable to employ counsel." (Emphasis added).

Among the Courts of Appeals which have construed Section 1915(d) in the context of determining the court's authority to require an unwilling attorney to represent an indigent person, the Eighth Circuit stands alone in finding a power to require an unwilling attorney to serve as counsel. The Fifth, Sixth, Seventh, and Ninth Circuits have uniformly held that the federal courts have no power to make a mandatory appointment under Section 1915(d), but can only "request" an attorney to undertake the representation. United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (9th Cir. 1986) ("In our view, 28 U.S.C. Section 1915(d) does not authorize appointment of counsel to involuntary service"); Ulmer v. Chancellor, 691 F.2d

209, 213 (5th Cir. 1982) ("A lawyer should not be conscripted into a Section 1983 case simply because he is a member of the bar, but this does not mean that all members of the bar should be denied the opportunity to assist the cause of justice under the authority of a court appointment"); Caruth v. Pinkney 683 F.2d 1044, 1049 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983) ("A court has the authority only to request an attorney to represent an indigent, not to require him to do so") (emphasis in original); Reid v. Charney, 235 F.2d 47 (6th Cir. 1956) ("The court . . . has the statutory power only to request an attorney to represent a person unable to employ counsel . . . . While the refusal of local counsel to serve was regrettable, the court could hardly do more than was done under the circumstances").

The Ninth Circuit, in the well reasoned opinion of United States v. 30.64 Acres of Land, 795 F.2d 796 (9th Cir. 1986), describes several factors which support its holding that unwilling attorneys cannot be compelled to represent indigent persons under Section 1915(d):

> Most persuasively, the plain language of the statute states that a court may "request" counsel for indigents. See 28 U.S.C. Section 1915(d). Statutes that have been construed as authorizing "appointment" of counsel commonly use such words as "appointment" or "assign." See, e.g., 18 U.S.C. Section 3006A(b) (1982) ("the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel"); 25 U.S.C. Section 1912(b) (1982) ("In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child.");

42 U.S.C. Section 1971(f) (1982) ("the court before which [a person charged with contempt under 42 U.S.C. Section 1975d(g)] is cited or tried . . . shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire . . . ."); 42 U.S.C. Section 2000e-5(f)(1)(1982) ("Upon application by the complainant [in a Title VII action] and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant . . . ."); see also Fed. R. Crim. P. 44 ("Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings . . . .").

In addition, if a statute intends appointment of counsel, it often makes provision for paying such counsel. See, e.g., 18 U.S.C. Section 3006A(d); 25 U.S.C. Section 1912(b) (1982). No statute provides funds to pay counsel secured under 28 U.S.C. Section 1915(d).

We also note that the consitutional requirements for civil actions differ significantly from those for criminal actions in which courts may appoint counsel. Federal criminal defendants facing imprisonment are entitled to representation of counsel, see, e.g., U.S. Const. amend. VI; Johnson v. Zerbst, 304 U.S. 458, 462, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938), and the power of courts

to appoint counsel for such defendants is thus necessary to preserve their constitutional rights. There is normally, however, no constitutional right to counsel in a civil case, see Lassiter v. Department of Social Services, 452 U.S. 18, 25-27, 101 S.Ct. 2153, 2158-60, 68 L.Ed.2d 640 (1981); Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971). But cf. Lassiter, 452 U.S. at 27-32, 101 S.Ct. at 2159-62 (suggesting that due process may in some cases require appointment of counsel for indigent parents in child custody termination proceedings). The failure of a court request actually to secure counsel therefore would not normally prejudice the civil litigant's constitutional rights. United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (9th Cir. 1986).

Many courts which have interpreted the meaning of Section 1915(d) have done so either (1) in the context of determining whether the court has the power to secure counsel for indigent persons or (2) in discussing the standards which a court should consider in deciding whether to exercise its

power. Consequently these courts have used the word "appoint" without any need to differentiate as to whether it means (i) to order an attorney to represent an indigent client or (ii) to designate a pro bono volunteer attorney as counsel of record for an indigent client. This point of semantics is illustrated by the following cases:

1. In McKeever v. Israel, 689 F.2d 1315 (7th Cir. 1982), the Seventh Circuit was confronted with a case where the district court had not attempted to obtain pro bono counsel. "The power of a court to provide counsel under Section 1915(d) is commonly referred to as a power to 'appoint.' The distinction between 'requesting' and 'appointing' is irrelevant in the present case where the district court was operating under the mistaken impression that it had no

authority whatsoever to secure counsel."

2. In Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984), the Fourth Circuit was confronted with a case in which the district court had denied the request for counsel under 28 U.S.C. Section 1915(d) on the ground that federal funds were not available to pay counsel. The Fourth Circuit held that the availability of federal funds was unrelated to the need for counsel, that the case presented exceptional circumstances requiring the assistance of counsel, and that the district court had the power to appoint counsel. The Whisenant court cited McKeever and noted that the statutory right to "request" had been construed as authorization to "appoint." Whisenant 739 F.2d at 163 n.3. However, the Court never considered whether the authorization to "appoint" meant authorization (i)

to order an attorney to represent an indigent client or (ii) to designate a pro bono volunteer attorney as counsel of record for an indigent client.

3. In Hodge v. Police Officers, 802 F.2d 58 (2nd Cir. 1986), the Second Circuit considered the guidelines for the exercise of Section 1915(d) discretion. Consequently, the use of the word "appointment" in this opinion does not indicate that the Court intended that word to mean that unwilling attorneys would be compelled to represent indigent persons.

Therefore, an analysis of the case law interpreting Section 1915(d), with due consideration to the context in which courts have used the term "appoint," shows that courts other than the Eighth Circuit have not interpreted Section 1915(d) to authorize appointment of

counsel to involuntary service.

The Eighth Circuit has thus created a confusing precedent by interpreting the term "to appoint" in such a way as to empower it to require unwilling attorneys to represent indigent persons. This precedent, which is based upon Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971), is likely to generate further confusion among the other Courts of Appeals which have not considered this issue, especially in light of the widespread use of the term "to appoint." There exists a very real potential that a court will miss the chain of logic which follows from (i) the request that an attorney undertake a representation, to (ii) the the voluntary acceptance by the attorney, to (iii) the appointment under the authority of the court. It appears that the Eighth Circuit itself may have

suffered from this confusion when it rendered its decision in Peterson v. Nadler, 754 F.2d 452 (8th Cir. 1971), without discussing or disapproving of Rhodes v. Houston, 258 F. Supp. 546 (D. Neb. 1966), aff'd, 418 F.2d 1309 (8th Cir. 1969), cert. denied, 397 U.S. 1049 (1970). The Rhodes court referred to

> the power of the attorney, by the court requested to provide professional assistance to a plaintiff in a civil suit, simply through his refusal of that request, for whatever reason, or for no reason, to frustrate the court's attempt to provide such plaintiff with counsel.

Rhodes v. Houston, 258 F. Supp. at 579 (emphasis in original).

Without guidance from this Court, the law regarding 28 U.S.C. Section 1915(d) will remain an open issue. The decisions (p.9, supra) of the Fifth, Seventh, and Ninth Circuits are relatively recent, having been decided in 1982,

1982, and 1986, respectively. In addition, because the cases apparently relied upon by the Eighth Circuit (p.6, supra) do not involve an attorney who is unwilling to accept an appointment, attorneys in the Eighth Circuit will remain confused regarding their obligations under Section 1915(d). The likelihood of confusion among attorneys in the Eighth Circuit is especially significant in light of the recent decision in United States v. 30.64 Acres of Land, 795 F.2d 796 (9th Cir. 1986), in which the Ninth Circuit clearly holds that Section 1915(d) does not authorize appointment of counsel to involuntary service. Id. at 801.

Finally, it is significant that the ruling of the District Court for the Southern District of Iowa below (p. 2a, infra) relied upon another case in that

District Court which was decided on June 16, 1987. Consequently, a decision by this Court would prevent multiple, frequent, and inconsistent determinations by lower courts.

II

The decision below raises important and unresolved issues regarding the limits of the right to counsel and the limits of the responsibility of the federal bar to assist in making counsel available.

The Eighth Circuit has held in this case that attorneys may be compelled to accept an "appointment" to represent an indigent person pursuant to 28 U.S.C. Section 1915(d). In doing so, the Court apparently relied on a case that, contrary to the clear statutory language (that a court may "request" an attorney to represent an indigent) reads into the statute the power to compel an attorney to provide representation based upon the professional duty of the bar to provide

public service. See Peterson v. Nadler, 452 F.2d 754, 758 (8th Cir. 1971).

It is clear that attorneys have committed themselves to make legal counsel available and to aspire to assist persons who do not have the financial ability to employ counsel. The Iowa Code of Professional Responsibility For Lawyers states:

> Financial Ability to Employ Counsel: Persons Unable to Pay Reasonable Fees
>
> EC 2-26. A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.
>
> EC 2-27. Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic

> responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional experience or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

That lawyers should perform pro bono services is not in dispute. The issue here is whether lawyers will continue to enjoy their traditional freedom to choose the circumstances under which they perform such services.

There are, obviously, limits to the

attorney's professional duty to provide services to indigents. One such limit is the power of the attorney to refuse a request under 28 U.S.C. 1915(d).

The Court of Appeals for the Eighth Circuit has, to all appearances, failed to acknowledge and consider the limits of an attorney's professional duty to perform volunteer services. However, the Ninth Circuit recently considered this issue in United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (9th Cir. 1986). The Court concluded that 28 U.S.C. Section 1915(d) does not authorize the appointment of counsel to involuntary service, reasoning that Congress chose to limit an attorney's professional duty when it used the plain language that a court may "request" counsel for indigents. Id. The Ninth Circuit's finding of a limitation on an attorney's

obligation is especially persuasive because the Court describes certain contrasting instances where statutes and well-settled constitutional law provide that an attorney "will" be appointed (pp. 11-13, supra). Based upon the authorities cited, it is clear that the drafters of the Constitution and Congress have singled out certain rights and privileges which are so highly regarded that legal representation must be made available, and a mandatory appointment of counsel is justified. With this understanding in mind, it is clear, and the Ninth Circuit so found, that Congress never decided to provide indigents or holders of Section 1983 claims with this extraordinary assurance of access to legal representation.

The Ninth Circuit also implicitly recognized that an attorney's obligation

to provide public service must be circumscribed so that the time required to be volunteered by the attorney, based upon the complexities of the modern legal system, does not lead to a financial penalty or tax "in kind." Because Congress has often made provision for the payment of appointed counsel, the Court implies that, in general, Congress does not intend to impose a mandatory appointment obligation upon an attorney in those instances involving statutes, such as 28 U.S.C. Section 1915(d), which do not provide for compensation. Id.

There are additional, important reasons why Congress would not want to compel an attorney to become involved in a particular case just because it involves an indigent person. For example, an attorney may have expertise in one area of law but not in another.

There would be little efficiency if a bankruptcy expert were assigned to try a case under 42 U.S.C. Section 1983, or vice versa.

At a minimum, the volunteer attorney should be competent. Iowa Code of Professional Responsibility for Lawyers, Disciplinary Rule 6-101(A)(1) provides that: "A lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it." Consequently, a lawyer volunteering his services should not be compelled to undertake a particular legal representation if he does not feel competent to handle it, regardless of whether the prospective client has the ability to pay.

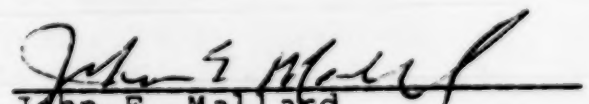
As a final consideration, in the interest of promoting volunteerism as a

public policy, an attorney should not be compelled to undertake the cause of a particular indigent if he has greater interest in other causes. An attorney's preferences of association with certain causes should be respected. Otherwise, compelling an attorney to "volunteer" his services for a particular cause would transform pro bono work from an activity based upon the "giving" of services to an activity with certain indicia of involuntary servitude.

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-2583

In Re: John E. Mallard,	*	Petition for
	*	Writ of
Petitioner,	*	Mandamus
	*	
	*	

The petition for writ of mandamus is hereby denied.

December 7, 1987

A true copy.

ATTEST: /s/ Robert St. Vrain
CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MARK ALLEN TRAMAN,	*	
	*	
Plaintiffs,	*	CIVIL NO. 87-317-B
	*	
v.	*	
	*	
STEVE PARKIN, et al.,	*	RULING ON MOTION
	*	
	*	
Defendants.	*	

The court has before it attorney John E. Mallard's appeal of the Magistrate's denial of his motion to withdraw, and his motion to dismiss appointment of counsel. The appeal and motion are unresisted, although time to do so has past.

Attorney Mallard argues first that he is incompetent, and therefore he should be permitted to withdraw, and second, that the court lacks power to appoint him to represent an indigent civil litigant. Mallard can hardly claim

incompetence when he has filed an eighteen page brief in support of this motion that demonstrates thorough research, careful reasoning, and effective writing. Despite his renunciation of any claim to being a "litigator", Mallard does have litigation experience. Even without litigation experience, Mallard would not necessarily be incompetent. Therefore, Mallard is not incompetent. On the second point, this court rejected that challenge in Coburn v. Nix, Civ. No. 86-716-B (S.D. Iowa June 16, 1987). In Coburn, this court held that 28 U.S.C. Section 1915(d) empowers the court to appoint attorneys to represent indigent civil litigants. Id.

Attorney Mallard's appeal is denied and the motion to dismiss appointment of counsel is overruled.

DATED this 27 day of October, 1987.

/s/ Harold D. Vietor

HAROLD D. VIETOR, Chief
Judge Southern District of Iowa